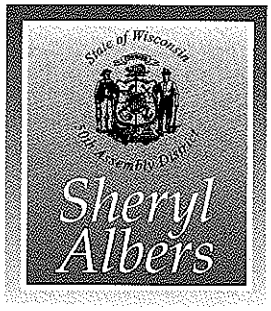

Testimony of Rep. Sheryl Albers on AJR 24 for the Assembly Committee on Elections and Constitutional Law April 18, 2007

Thank you for the opportunity to testify before you today on AJR 24, which would require all Wisconsin Supreme Court conferences to be open to the public.

This proposed constitutional amendment is a fascinating idea that deserves debate. In some ways, it is not necessarily a new idea. In many other ways, however, this concept is groundbreaking and so I do not expect an extraordinary amount of movement for a joint resolution that is only now getting serious consideration by legislative committee and the media.

The idea to open up the conferences of the highest court in our state should not be that earth shattering because Wisconsin enjoys a long tradition of open meetings of government bodies. What is wrong with extending the idea of open government and transparency to the Supreme Court?

The people of Wisconsin know very little about their Supreme Court and its justices. According to a poll released just last month that was conducted for the Federalist Society, over 60% of the respondents knew little to nothing about the Wisconsin Supreme Court. Furthermore, 76% of the people polled could not even name a Supreme Court justice! And yet we expect an uninformed and detached electorate to make responsible choices in Supreme Court elections? I am not advocating for the appointment of justices, but I believe that opening up the Court's conferences and letting the public observe the discourse could be a helpful tool in educating and informing voters on the issues and persons involved.

I have introduced and scheduled a hearing for this resolution to gather the input of the committee and the public on this issue. I and other supporters of this idea value your opinion, and I would be happy to take any questions you might have…

State Capitol Office: P.O. Box 8952 • Madison, Wisconsin 53708-8952
(608) 266-8531 • (877) 947-0050 • FAX: (608) 282-3650 • Rep.Albers@legis.wi.gov
District: 339 Golf Course Road • Reedsburg, Wisconsin 53959 • (608) 524-0022

TESTIMONY ON ASSEMBLY JOINT RESOLUTION 24
A. John Voelker, Director of State Courts
Assembly Committee on Elections and Constitutional Law
April 19, 2007

Thank you for the opportunity to address you today.

As you may know, the Wisconsin Supreme Court and state court system is deeply concerned about Assembly Joint Resolution 24.

This proposed constitutional amendment could do more harm than good by potentially introducing a political element into the Supreme Court's decision-making process and by stifling frank and critical discussion among justices.

It also would rob the court of its administrative power granted by the state constitution.

The Wisconsin Supreme Court is among the most open High Courts in the country. It was among the very first appellate courts in the country to open both its rules hearings and its administrative conferences to the public. It remains among courts in just a handful of states to post notice for such meetings and hold them in open session.

Wisconsin also is recognized as a pioneer in allowing cameras and electronic recording equipment in courtrooms, and Supreme Court Rules ensure openness in operations of all state courts.

The court also takes an active role in promoting public awareness of its work. The court system's Web site provides live and archived audio from rules hearings and oral arguments without charge. Anyone with access to a computer and the Internet can access public court records statewide through the Wisconsin Circuit Court Access Web site. Summaries of each case to be argued before the Supreme Court are prepared and sent to the press in advance and posted on the Court's Web site, along with a wealth of news and information about the court system.

Full and detailed explanations of the Court's decisions also are posted on our Web site immediately when opinions are released. Each justice publicly indicates how he or she voted in a particular case.

The Wisconsin court system is proud of its tradition and commitment to transparency, access and openness.

Unfortunately, AJR 24 would build into the State Constitution a restriction that has not been imposed on any appellate court in the country through legislation, let alone a constitutional amendment.

There are good reasons for confidentiality as members of the Supreme Court meet to discuss cases.

First, case decisions made by justices at conference may change during subsequent discussions and in the process of drafting an opinion. For courts to work effectively, and for justice to be served, ideas and legal concepts must be aired, exchanged and argued.

Imagine being a Supreme Court justice yet not being able to openly and freely discuss legal principles and concepts with colleagues on the court. That would not only be a setback for justices, it would be a setback for justice. The truth is not always readily apparent, and legal complexities sometimes don't readily reveal themselves without a thorough and disciplined vetting.

Second, in debating legal issues, a justice may assume the role of an adversary for the sake of challenging the validity of an argument. This could easily be misinterpreted by the public and press.

Third, a justice may sense outside pressure to grant or deny a case without even having the advantage of hearing the candid thoughts of other justices or being able to speak their own mind.

Decisions of the Supreme Court must be based on the facts of the case and applicable law, not outside pressure. The effective administration of justice depends on frank and earnest debate -- in an environment where frank and earnest debate can occur.

It's not by accident, nor is it unique, that justices are expected to discuss details of cases in private. The U.S. Supreme Court and appellate courts throughout the country have followed similar protocols throughout their histories. We are not aware of any state where an appellate court must meet in open conference to discuss cases.

The (U.S.) Supreme Court Historical Society, with help from the late Justice Harry A. Blackmun offers this perspective on closed conferences:

> *"We could not function as a court if our conferences were public," Justice Blackmun once explained, "There are just the nine of us, no more...[W]e can say what we initially believe, only to be proved wrong by the honing effect of conference and agreement and disagreement."*

We hope you see the merit of this sentiment and concur.

The Wisconsin court system has a proud tradition of openness, but this proposal would restrain the exchange among justices that is critical to the case-deciding function of the Supreme Court.

STATE BAR of WISCONSIN®
WISCONSIN LAWYERS
EXPERT ADVISERS. SERVING YOU.

MEMORANDUM

To: Assembly Committee on Elections and Constitutional Law

From: Atty. John Walsh, Chair
Legislative Oversight Committee
State Bar of Wisconsin

Date: April 19, 2007

Re: State Bar of Wisconsin opposition to AJR 24 (open Supreme Court case conferences)

The State Bar of Wisconsin strongly opposes Assembly Joint Resolution 24, which would amend the Wisconsin Constitution to require the Wisconsin Supreme Court open its decision-making case conferences to the public. The State Bar's Board of Governors' vote to oppose this proposed constitutional amendment was overwhelming, almost unanimous.

This proposal is the proverbial solution in search of a nonexistent problem. In fact, this proposal is most notable for what it does not include. If Supreme Court case conferences should be open to the public, then why should not the Legislature's partisan political caucuses be open to the public? The decisions made in those legislative forums have a far broader and more immediate impact on the citizens of Wisconsin. Similarly, why should not all meetings of the Governor and his advisers be open to the public?

The answer is obvious. Meeting in public often stifles open and frank debate and discussion. The fact is that, in certain settings, meeting in public does not promote the free exchange of ideas and arguments. That is why the Legislature continues to meet in secret caucuses. That is why the Executive Branch deliberates behind closed doors. And that is why the Supreme Court meets privately when deciding cases.

In many ways, the Supreme Court is more open to public scrutiny when it decides cases then either the Legislature or the Executive Branch is when carrying out their respective functions. Not only are the Court's oral arguments open to the public – just like Legislative floor debates -- but more importantly, a thorough written rationale for the Court's decision is filed to explain its ultimate decision in each case. That certainly cannot be said about decisions made by either the Legislature or the Executive Branch. The Court's decisions are not just authority for future litigation, but serve to inform the public as to the Court's decision-making process and its views as to how the law applies to the facts of each case. Not only does the Legislature continue to caucus in secret, it is never required to explain the reasons for its decisions to the public.

Assembly Joint Resolution 24 is yet another unwarranted attack on the judiciary, which under the American system of government is to be a separate but **equal** branch of government. The State Bar of Wisconsin urges the committee to reject this proposal.

State Bar of Wisconsin
5302 Eastpark Blvd. ◆ P.O. Box 7158 ◆ Madison, WI 53707-7158
(800) 728-7788 ◆ (608) 257-3838 ◆ Fax (608) 257-5502 ◆ Internet: www.wisbar.org ◆ Email: service@wisbar.org

ASSEMBLY COMMITTEE ON ELECTIONS AND CONSTITUTIONAL LAW

TESTIMONY OF ATTORNEY STEVEN LEVINE
IN SUPPORT OF AJR 24
REQUIRING THE SUPREME COURT OF WISCONSIN
TO HOLD ITS CASE CONFERENCES IN PUBLIC

My name is Steve Levine, an attorney residing in Madison, and President of the State Bar of Wisconsin. I am pleased and thankful to be able to testify in favor of AJR 24. I do so on my own behalf and not on behalf of the State Bar.

There are a number of reasons why the Supreme Court should be required to meet in public when it holds conferences to debate, discuss, and vote on cases which are appealed to the court.

Wisconsin's Open Meetings Tradition. Wisconsin has a long tradition of requiring government bodies to meet in public so that the public is able to see its governmental officials in operation and to make informed choices. An informed public is a responsible public. The legislature, city councils, county boards, school boards, etc. are all required to meet in public. Meeting in public is an essential aspect of a government body, because that body is responsible to the people.

Educational Value. Meeting in public would have a tremendous educational value for both the public in general and for the legal community. The public would be able to view Supreme Court conferences and be educated and gain confidence in the operation of its judicial branch of government. Lawyers who handle cases before the court would be educated in the way the court operates and in the judicial philosophies of the individual justices.

Elections. Wisconsin elects its Supreme Court justices. Yet, justices are often reluctant to take positions on issues in Supreme Court races. Open Supreme Court case conferences would allow the public to see how well the justices perform their duties and let the public know the individual justices' views on particular issues, allowing the public to make an informed electoral choice.

Civility. Open Supreme Court conferences would add to civility. When questioned by a reporter in February, 2007, in Milwaukee, one of the justices stated that she was opposed to open case conferences, because the justices are not always polite to each other during conferences, and it would be embarrassing if this rudeness were made public. Holding conferences in private so that the justices can be uncivil to each other is not a legitimate argument. Justices can and should disagree without having to be disagreeable. If open case conferences do no more than increase civility on the court, they will accomplish a great deal.